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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., CHRISTINE LUND,

Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

MOTION OF THE TIMES MIRROR COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

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vs.

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Respondents.

Motion of the Times Mirror Company for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California.

The Times Mirror Company ("Times Mirror") respectfully moves hereby for leave to file the attached brief as *amicus curiae* in support of the petition of American Broadcasting Companies, Inc. and Christine Lund for a writ of certiorari to the Supreme Court of California. Consent to the filing of said *amicus curiae* brief has been obtained from the petitioners. Respondents have refused to consent.

Times Mirror publishes the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and newspapers in New York, Texas and Connecticut. As a major California newspaper publisher, Times Mirror has a vital interest in the adverse effects certain to result from the California Supreme Court's misapplication of the principles enunciated by this Court in *New*

York Times Co. v. Sullivan, 376 U.S. 254 (1964) and in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). Unless reviewed and corrected by this Court, the California Supreme Court's decision is certain to deprive the public of access to vitally important reporting concerning consumer affairs.

Petitioners' brief does not focus upon the fact that respondents' voluntary and active solicitation of public support and patronage through advertising served to confer public figure status upon them as a matter of law, at least with respect to nonmalicious speech critical of that advertising. Times Mirror seeks leave to file the attached brief as *amicus curiae* to develop that argument.

DATED: April 18, 1980.

Respectfully submitted,

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Respondents.

BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE

STATEMENT OF INTEREST

The Times Mirror Company ("Times Mirror") respectfully presents this brief as *amicus curiae* on motion in support of the Petition for Writ of Certiorari filed by American Broadcasting Companies, Inc. and Christine Lund. Times Mirror's vital interest in these proceedings stems from its publication of the *Los Angeles Times*, a privately owned metropolitan newspaper with a general daily circulation in excess of one million copies, as well as from its ownership of a California community newspaper, the *Orange Coast Daily Pilot* (Costa Mesa, California). Additionally, Times Mirror publishes newspapers in New York, Texas and Connecticut.

Times Mirror has an obvious concern with the constitutional propriety of a California Supreme Court decision which drastically cuts away from the first amendment pro-

tections afforded by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that regard, Times Mirror has participated in key California cases relating to the application of the first amendment to press publications. *See, e.g., Yorty v. Chandler,* 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970).

QUESTION PRESENTED

Is a business which widely appeals and advertises for the trade of public consumers a "public figure," at least insofar as criticism of the truthfulness of that advertising is concerned?

ARGUMENT

The facts have been described in the opinion below and quoted in petitioners' brief. In sum, two distress merchandising concerns took over the liquidation sale of a prominent, high quality San Francisco department store and advertised widely for customers. Defendant television station, acting on the basis of information supplied by the Better Business Bureau, criticized the advertising campaign, suggesting that the good name of the department store was being used to sell inferior merchandise. The question presented is whether the advertisers (referred to collectively as Vegod Corporation) are "public figures" required to prove constitutional malice in their defamation action against the petitioners.

The trial court found Vegod Corporation to be a public figure as a matter of law; the intermediate court of appeal affirmed. However, the California Supreme Court, in an opinion sure to constrict critical news reporting of business and consumer affairs, held that Vegod was not a public figure:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (*Herbert v. Lando* (1979) — U.S.— ,— , [60 L.Ed.2d 115,129, 99 S.Ct.—]), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.

Vegod Corp. v. American Broadcasting Companies, Inc., 25 Cal.3d 763, 770, 160 Cal.Rptr. 97, 101, 603 P. 2d 14, 18 (1979) (footnote omitted).

On its face, the California Supreme Court opinion contradicts the "public figure" concepts set forth by this Court in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). In *Butts*, the defendant magazine had reported upon an alleged "fix" of a football game involving the well-known coach of the University of Georgia team. In *Walker*, the Associated Press had reported upon riots occurring on the campus of the University of Mississippi; its dispatch reported that the libel plaintiff, retired General Walker, had led the unruly mob and incited them to unlawful acts. In finding Butts and Walker to be "public figures" required to prove constitutional malice in their actions against the defendants, this Court in its plurality opinion relied upon the common law tort definitions of "public figures":[1]

> We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in New York Times. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. See Spahn v Julian Messner,

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[1]Undoubtedly, Butts was the prototypical "all purpose" public figure, and Walker the prime example of the "vortex" public figure, later described in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974):

> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. *Id.* at 345.

> Inc., 18 NY2d 324, 221 NE2d 543, remanded on other grounds. 387 US 239, 18 Led 2d 744, 87 SCt 1706. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. Whitney v California, 274 US 357, 377, 71 L ed 1095, 1106, 47 SCt 641 (Brandeis, J., dissenting).

Id. at 154-155.

Butts and *Walker* was, in turn, a logical extension of *New York Times Co. v. Sullivan*, which had elevated the common law privilege of "fair comment" expressed in *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), to constitutional dimension. That privilege was not restricted to public officials such as those involved in *Coleman* and *New York Times*, but also extended to criticism of others who held themselves out for public approbation and acceptance. *See, e.g., Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901) (theatrical performers); W. Prosser, Law of Torts 822 (4th ed. 1971).

Cases applying *Butts* and *Walker* have, in accordance with common law concepts, held to be public figures such diverse individuals as the biographer of a prominent author,[2] a well-known TV entertainer,[3] a "playmate of the month,"[4]

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[2]*Hotchner v. Castillo-Puche*, 404 F.Supp. 1041 (*S.D.N.Y. 1975*), *rev'd on other grounds*, 551 F.2d 910 (2d Cir. 1977), *cert. denied sub nom. Hotchner v. Doubleday & Co., Inc.*, 434 U.S. 834 (1977).

[3]*Carson v. Allied News Co.*, 529 F.2d 206 (*7th Cir. 1976*).

[4]*Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E. 2d 1211 (*Ind. App. 1978*).

the author of a letter to a newspaper,[5] a belly dancer,[6] a weightlifting coach[7] and a football player.[8] A salient feature of these cases is that the libel plaintiff in each was one who had solicited public approval or patronage and thus was required to endure nonmalicious public criticism. In the words of this Court, each had "invite[d] attention and comment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).[9]

Applying these principles to the case at hand, it seems obvious that Vegod Corporation is a "public figure" required to submit to nonmalicious criticism respecting its advertising campaign. Just as surely as do actors, authors, sports figures and retired generals haranguing a mob, Vegod Corporation voluntarily and actively solicited public approval, as well as the public's hard-earned consumer dollars. Its campaign for those dollars was mounted in the media and its appeal was aimed at the entire consuming public in

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[5]*Wright v. Haas*, 586 P.2d 1093 (Okla. 1978).

[6]*James v. Gannett Co.*, 40 N.Y. 2d 415, 353 N.E. 2d 834 (1976).

[7]*Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C. 1977), *aff'd mem.* 578 F. 2d 442 (D.C.Cir. 1978).

[8]*Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979).

[9]The concept of the existence of a public "controversy" is not relevant in cases involving those who otherwise voluntarily solicit public approbation or patronage. A preexisting controversy regarding an actor's performance is not required to justify criticism of that performance; the absence of a preexisting "controversy" is, however, of great significance when the plaintiff has not held himself out for public approval and his involvement in a controversy arising only from the defamatory publication is itself advanced as the reason for imposing public figure status. *See Hutchinson v. Proxmire*, 99 S.Ct. 2675 (1979); *Wolston v. Reader's Digest Ass'n Inc.*, 99 S.Ct. 2701 (1979).

In the present case, Vegod Corporation voluntarily engaged in widespread advertising designed to elicit the approval and patronage of consumers. Requiring the presence of a preexisting "controversy" concerning the truthfulness of such advertising would impose the most severe burden upon the speaker who best serves the public interest by first revealing the secret fraud.

the San Francisco area. Nevertheless, because of its notions regarding the relative importance of the content of ABC's speech respecting Vegod's conduct, the California Supreme Court impermissibly found Vegod Corporation not to be a public figure. The California court's analysis is wrong for two reasons.

First, this Court has repeatedly held that the protection of speech is not to be determined by the presumed importance of its content. Accordingly, speech which constitutes mere "entertainment" is entitled to full constitutional protection, *see Kingsley International Pictures Corp. v. Regents of the University of New York*, 360 U.S. 684, 690 (1959); *Winters v. New York*, 333 U.S. 507, 510 (1947), as is speech which may lead to undesirable social results, such as "blockbusting." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).[10]

Second, any thought that the commercial speech criticized by ABC was of no particular public importance runs directly counter to recent decisions of this Court. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). As stated in *Bates*:

> [T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern

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[10]Although a state may impose reasonable time, place and manner restrictions on the expression of protected speech, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Arguably, the California Supreme Court's decision to hold the news media to a higher standard of care in reporting commercial affairs than that to which they must conform when reporting public affairs of a non-commercial nature amounts to an impermissible restriction on speech based solely upon its content.

> for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

433 U.S. at 364.[11]

The proper analysis to be applied to Vegod Corporation clearly is that applied to the Reliance Insurance Company in *Reliance Insurance Company v. Barron's*, 442 F.Supp. 1341 (S.D.N.Y. 1977). In holding a company presenting its stock to the public for purchase to be a "public figure" required to submit to nonmalicious criticism of the truthfulness of its prospectus, Judge Brieant noted:

> Insurance was, at the time of the libel, offering to sell its stock to the public, thereby voluntarily thrusting itself into the public arena, at least as to all issues affecting that proposed stock sale. Accordingly, it is clear that Insurance is certainly a public figure with

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[11]The news report at issue here was not, of course, commercial speech, but a form of expression which traditionally has received full first amendment protection. Therefore, even if commercial speech is entitled to less first amendment protection than traditionally protected forms of speech, there is no constitutionally permissible basis for the California court's holding that news criticism of such speech is itself entitled to less first amendment protection.

> respect to issues involving its offering of securities to the public.

Id. at 1348 (footnote omitted). In addition, Judge Brieant observed that "[a]lthough Insurance did not have access to the media during the period of registration, because of peculiarities of federal securities law, it does have and has exercised its access to 'channels of effective communication.' (*Gertz*, 418 U.S. at 344, 94 S.Ct. 2997)." *Id.*

At least with respect to issues concerning its advertising, Vegod Corporation was a public figure with demonstrated "access" to the public. It was able to, and did, effectively employ media channels to convey to the public its views that the wares it was selling should be purchased. The effect of the decision of the California Supreme Court is to deny the public access to nonmalicious criticism of such advertisements aimed at alerting consumers to their deceptive nature. No principle of preserving interests in private reputations justifies so adverse a societal result.

CONCLUSION

The decision of the California Supreme Court seriously misapplies the "public figure" concept enunciated by this Court in *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*, which was in turn based upon common law principles of fair comment. Unless reviewed and corrected by this Court, that decision is certain to dampen vital reporting respecting consumer affairs, leaving the field open

only to those with access to the public through their ability to purchase advertising and depriving the consumer of essential, nonmalicious criticism of the truthfulness of that advertising.

Respectfully submitted,

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